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Tuesday, June 27, 2006

U.S. Supreme Court decides to hear global warming case

The U.S. Supreme Court has decided to hear *Massachusetts v. EPA,* a challenge by some states in federal court to force the EPA to regulate carbon dioxide even absent specific instructions to do so from Congress. This case is related to the non-delegation doctrine, the origins of which I have written about in a paper. However, the non-delegation doctrine will probably not be reached since the EPA (which like other regulatatory agencies and the Justice Department hates the doctrine, as it enforces democratic oversight) is defending the case. Thus the EPA and its opponents are staking out their arguments around the issue of whether EPA *must* regulate carbon dioxide, not around the issue of whether it *can.* Under the non-delegation doctrine as Madison and most other Founders understood it, and as it was understood by the Supreme Court until the late 1930s, the EPA should not be able to regulate carbon dioxide even if it wanted to, absent specific instructions from Congress to do so.

Despite the EPA not having properly raised the non-delegation issue, it is highly likely that several court conservatives wish the EPA would raise it, and possibly might raise it themselves, although normally they are loathe to raise issues that the parties have not properly raised. Indeed, the Court (with the concurrence of all the conservative justices) recently dismissed a case because the party based its Supreme Court appeal around an issue that it had not properly raised in the lower courts. However it's possible that an argument of the auto industry intervenors could be construed as properly raising the non-delegation issue, although their argument is fairly narrow: that Congress has already delegated authority over carbon dioxide to a different agency.

The state challenge to the EPA was rejected at the circuit court level and has very little chance of succeeding at the Supreme Court, but it will be interesting to hear the various reasons the justices will give for rejecting it.

Posted by Nick Szabo at 10:37 AM

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Nick Szabo

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